R. L. Polk & Co. *and* Local 174, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW). Cases 7–CA–22444 and 7–CA–23046

April 13, 1994

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On October 28, 1992, Administrative Law Judge James L. Rose issued the attached decision. The General Counsel and the Charging Party (the Union) filed separate exceptions and supporting briefs. The Respondent filed answering briefs in response to the exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order.

On January 16, 1985, Administrative Law Judge Peter Donnelly issued his decision in this case in which he recommended the dismissal of the complaint in its entirety. On March 12, 1985, the Board issued an Order adopting, in the absence of exceptions, the findings, conclusions, and recommendations of Judge Donnelly, and dismissed the complaint. The case was then closed.

The questions raised on motions by the Charging Party and the General Counsel now are whether the record in this case should be reopened, whether the dismissed 8(a)(5) complaint should be reinstated and amended to include an 8(a)(3) allegation, and whether violations of Section 8(a)(5) and (3) based on the Respondent's 1983 conduct should be found. It is well established that the Board has considerable discretion in deciding whether to reopen the record in a particular case.[2] We agree with Judge Rose's recommendation that the record should not be reopened and the complaint should not be reinstated and amended. For the reasons discussed below, we deny the pending motions in this case.

The Respondent is engaged in publishing directories, statistical data, and direct-mail advertising throughout the United States. In 1983, the Respondent decided to transfer its lettershop operations at its Taylor, Michigan facility to its Berea, Ohio facility.[3] An amended complaint issued on March 15, 1984, and alleged, inter alia, that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally transferring the lettershop operations (unit work) from Taylor to Berea.[4]

In September 1984, the General Counsel served several subpoenas duces tecum on the Respondent directing it to produce certain company documents relating to the amended complaint's allegations, including the unit work transfer issue. In response to these subpoenas, the Respondent produced documents at the beginning of, and during, the hearing before Judge Donnelly. After the hearing closed, Judge Donnelly issued his decision[5] which the Board later adopted in the absence of exceptions.

On December 3, 1990, the Union filed a motion to reopen record. The General Counsel filed a response concurring with the Union's motion and another motion to amend the complaint to add an 8(a)(3) allegation. The General Counsel and the Union asserted that they recently had learned for the first time that the Respondent's compliance with the General Counsel's subpoenas in 1984 had been incomplete because the Respondent had failed to turn over specific company documents which would have shown that its 1983 transfer decision was motivated by antiunion considerations. The Respondent opposed both motions.

On March 1, 1991, the Board ordered that a hearing be held on the issues of fact and law raised by the motions. The Board stated that ''[t]he threshold issue at such hearing is whether Respondent failed to comply with the subpoena duces tecum.'' Pursuant to the Board's Order, a hearing on the motions was conducted before Judge Rose.

At the hearing before Judge Rose, the parties stipulated that the following three documents were in existence in 1984 and were covered by the General Counsel's 1984 subpoenas: (1) an internal company memorandum dated March 31, 1983, from John K. Johnson, the assistant general manager (production), to Julian W. Haydon, the general manager of direct mail (marketing services) division; (2) an internal memorandum

[1] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] See, e.g., *NLRB v. Cutter Dodge, Inc*., 825 F.2d. 1375, 1376 (9th Cir. 1987).

[3] The lettershop employees at Taylor were represented by the Union, while the lettershop employees at Berea were represented by a different labor organization.

[4] On the same date, the General Counsel also withdrew a complaint allegation that the Respondent's work transfer violated Sec. 8(a)(3) of the Act. The General Counsel's theory for the withdrawn allegation had been that the Respondent's actions were ''inherently destructive'' of employees' rights. The corresponding 8(a)(3) portion of the Union's charge was simultaneously dismissed. That dismissal was later upheld when the Union appealed to the General Counsel.

[5] The judge found that the Respondent's decision to transfer the unit work from Taylor to Berea was not a mandatory subject of bargaining and was based on legitimate economic reasons other than a desire by the Respondent to avoid labor costs incurred in Taylor under the Union's collective-bargaining agreement.

dated April 28, 1983, from Haydon to Ralph L. Polk Jr., the president; and (3) an internal memorandum dated May 31, 1983, from Haydon to C. A. Wollenzin Jr., who was serving as the acting president in Polk's absence.[6] The General Counsel and the Union jointly argued, based chiefly on the testimony by Richard Allen, the Respondent's former manager of labor relations, that the Respondent had deliberately withheld these three memos from the General Counsel. The Respondent countered that Allen's testimony should be discredited. According to the Respondent's position, these memos had been made available to the General Counsel or, alternatively, there was insufficient evidence to show that they had not been produced in 1984.

Judge Rose discredited Allen. Based on his credibility resolutions, the judge found the following facts relevant to the threshold issue of compliance with the subpoenas.

Richard Allen was in charge of gathering the documents requested by the General Counsel's 1984 subpoenas. Allen discovered the March 31, April 28, and May 31, 1983 memoranda, but decided not to say anything about them to the outside labor attorneys who had been hired to defend the Respondent in the hearing before Judge Donnelly. Allen viewed the memoranda as detrimental to the Respondent's defense to the pending unfair labor practice charges. However, Allen asked his superior John M. O'Hara, who was then the Respondent's general counsel, for advice as to whether the Company should provide these three documents to the General Counsel. O'Hara told Allen to comply with the subpoenas.

At the hearing, the General Counsel was presented with 10 boxes of company documents brought to the hearing room by the Respondent in response to the outstanding subpoenas.[7] One of those boxes concededly contained material relating to the work transfer issue raised by the complaint.[8] James Stevens, counsel for the General Counsel,[9] was principally responsible for examining the documents in that box for the General Counsel. The record reflects that Stevens did not look at all the documents in that box or make a list of that material.[10]

Judge Rose correctly observed that there is a strong policy favoring an end to litigation.[11] Similarly, he correctly stated that the General Counsel, the party at whose request the subpoena duces tecum was issued, bears the burden of showing noncompliance by the Respondent. Applying this standard, we conclude that the record does not support a finding that the General Counsel has established that the March 31, April 28, and May 31, 1983 memoranda were not proffered to the General Counsel in the 10th box which contained the Respondent's documents relevant to the work transfer issue. Under these circumstances, we agree with the judge that the General Counsel failed to meet his burden of proof and that there was insufficient evidence to show noncompliance by the Respondent.[12] On this basis, and given the heavy burden which rests with the parties seeking at this date to reopen this litigation, we adopt the judge's recommendation to deny the motions to reopen the record and to reinstate and amend the complaint.[13]

ORDER

The recommended Order of the administrative law judge is adopted and the motions are denied.

[6] The three 1983 memos are more fully described in sec. II,A, of the judge's decision.

[7] The General Counsel did not create any list or maintain any inventory of the company documents produced by the Respondent.

[8] The other nine boxes of material dealt with another complaint allegation unrelated to the work transfer issue.

[9] Stevens, who served as the lead trial attorney for the General Counsel in this case, died in April 1986.

[10] Judge Rose also found that Allen arrived at the hearing with a folder of documents. Whether Allen had the three 1983 memos in the folder is not known for certain. Allen denied having the folder with him at all, and he was never asked in 1984 what he had brought in compliance with the General Counsel's subpoenas. The judge found that Allen did have the three memos in his folder and was prepared to produce them at the 1984 hearing if required to do so. We find it unnecessary to pass on the judge's latter finding because we adopt his finding that the General Counsel failed to show that the documents in question were not in the boxes of material provided by the Respondent at the 1984 hearing. There is simply no credible evidence in the record that Allen ignored O'Hara's direct order to comply with the subpoenas.

[11] See, e.g., ''[W]here the new evidence only suggests that a witness might be less than credible, the interest in finality outweighs the slight possibility of injustice to a party.'' *NLRB v. Jacob E. Decker & Sons*, 569 F.2d 357, 363 (5th Cir. 1978).

[12] We stress that the result reached in this case is controlled by the peculiar facts presented and does not suggest that we condone anything less than full compliance with Board subpoenas.

[13] The judge also recommended denial of both motions based on two other grounds: (1) the General Counsel had not exercised reasonable diligence in discovering the existence of the three memos in question before the record closed; and (2) these memoranda, singly or together, were insufficient to require a different result from that reached by Judge Donnelly. We find it unnecessary to pass on the judge's alternative reasons for denying the motions.

Amy Bachelder, Esq. and *George Mesrey, Esq.*, for the General Counsel.

Paul H. Townsend Jr., Esq. and *Charles C. DeWitt Jr., Esq.*, of Detroit, Michigan, for the Respondent.

Nancy Schiffer, Esq., of Detroit, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me from February 3 through 6 and June 30, 1992, supplementing the hearing commenced by Judge Joel

A. Harmatz on June 24, 1991, subsequent to which he recused himself.

All parties were represented by counsel and submitted posthearing briefs. On the record[1] as a whole, including my observation of the witnesses and briefs and arguments of counsel, I make the following

FINDINGS OF FACT

I. PROCEDURAL HISTORY

On August 4, 1983, Local 174, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (the Union or the Charging Party) filed the charge in Case 7–CA–22444. An order consolidating cases, amended complaint and notice of hearing dated March 15, 1984, recites that another charge was filed by the Union in Case 7–CA–23046 on January 24, 1984. This second charge was not among the formal papers.

The amended complaint alleged, in general, that the Respondent violated Section 8(a)(5) of the National Labor Relations Act by: (1) unilaterally transferring work traditionally performed by employees at its Taylor, Michigan facility to its facility at Berea, Ohio, and (2) unilaterally subcontracting work traditionally performed by employees in the bargaining unit at the Taylor facility.

In the original complaint, based on the charge in Case 7–CA–22444, it was alleged that the transfer of work from Taylor to Berea was violative of Section 8(a)(3) as well as Section 8(a)(5). With *Milwaukee Spring Division*, 268 NLRB 601 (1984), there was a shift in Board law and on March 15, 1984, the Regional Director for Region 7 issued an order dismissing the 8(a)(3) portions of the charge. The Charging Party appealed this decision to the General Counsel, who sustained the dismissal, concluding there was insufficient evidence that the consolidation of work at Berea was motivated by antiunion considerations to warrant alleging an 8(a)(3) violation. Thus no such allegation appears in the amended complaint issued that day.

Further, at the original hearing in this matter before Judge Peter E. Donnelly, the parties agreed that an 8(a)(3) violation would not be litigated. However, there was evidence of an antiunion motive and it was considered by Judge Donnelly, since the reason for the Company's decision to consolidate was the ultimate issue.

The trial was held on September 24–27, 1984. Judge Donnelly issued his decision dismissing the complaint in its entirity on January 16, 1985, concluding that the decision to transfer work from Taylor to Berea ''was based on business considerations and while labor costs were considered, the decision did not 'turn on' that item.'' JD–5–85, slip op. at 10. The subcontracting allegation was apparently considered derivative and was not seriously pursued, the General Counsel having not even briefed the issue. It was summarily dismissed by Judge Donnelly. Id. at 11 fn. 10. No exceptions were taken and on March 12, 1985, the Board adopted the findings, conclusions, and recommended Order of Judge Donnelly.

On December 30, 1990, the Charging Party filed a motion to reopen record with the Board, contending that in October 1990 it learned that at the time of the trial there existed documents of the Respondent which show that the transfer of work from Taylor to Berea was motivated by union animus. The Charging Party further contended that these documents were covered by subpoenas duces tecum issued by counsel for the General Counsel and had not been produced by the Respondent. The General Counsel filed a response concurring with the Union's motion to reopen, and subsequently filed a motion to amend amended complaint to add an 8(a)(3) allegation.

Since a motion to reopen a record after decision by the Board is controlled by Section 102.48(d)(1) of the Board's Rules and Regulations, the issue here is whether the conditions of that section have been met. In pertinent part Section 102.48(d)(1) states:

> A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

Thus on March 1, 1991, the Board entered an order that a hearing be held for the purpose of taking evidence on the issues presented by the Charging Party's motion, stating, in pertinent part:

> Having duly considered the matter, the Board finds that Charging Party's Motion to Reopen raises issues of fact and law which require a hearing. The threshold issue at such hearing is whether Respondent failed to comply with the subpoena duces tecum. (Footnote: A related issue is whether the evidence concerning any such noncompliance is newly discovered or was fraudulently concealed.) Assuming that there was such noncompliance, the next issue is the impact, if any, of the withheld evidence on the 8(a)(5) issues that were litigated in this proceeding and on any 8(a)(3) issues that may be appropriately raised.
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> It appears that the administrative law judge who heard this case had discussions with the parties, both on and off the record, concerning compliance with the subpoena. Since these discussions may become relevant to the issues to be raised in the reopened hearing, the Board considers it appropriate to designate a different judge to hold such hearing and issue a decision.

I disagree with the General Counsel's contention that the Board thereby granted the motion to reopen. It clearly did not. The Board stated that the motion ''raises issues of fact and law which require a hearing.'' Only after an evidentiary hearing can it be determined whether the factual predicate for reopening the record has been established. If the facts support the Charging Party's contention that the evidence in question is ''newly discovered'' within the meaning of Section 102.48(d)(1), then the motion should be granted, if that evidence would require a different result.

[1] Counsel entered into a joint motion to receive exhibits and correct the official record, which I have marked and entered into evidence as Jt. Exh. 6 and grant.

Therefore, this proceeding deals with two basic issues: (1) whether the evidence is ''newly discovered'' and (2) if so, whether receipt of the evidence would ''require a different result'' than that reached by Judge Donnelly and the Board.

Whether the evidence is ''newly discovered'' depends on whether (1) it existed at the time of the trial and (2) the General Counsel was excusably ignorant of its existence. Excusable ignorance in turn depends on whether the General Counsel exercised due diligence in discovering the evidence.

Inasmuch as counsel for the General Counsel caused to be issued a subpoena duces tecum which covers the documents in question, a threshold issue on the matter of due diligence is whether there was compliance with the subpoena. In this proceeding, the General Counsel has the burden of proving that the Respondent did not comply, which I conclude was not established. In addition, simply causing a subponea to be issued does not end the inquiry on the matter of due diligence.

II. ANALYSIS AND FINDINGS

A. *The Evidence in Issue*

The principal item of evidence which the General Counsel and the Charging Party contend is newly discovered is an internal memorandum of the Respondent to C. A. Wollenzin Jr. (the then acting president during the absence of Ralph L. Polk Jr.) from Julian W. Haydon, the general manager of the direct mail (marketing services) division, dated May 31, 1983 (referred to in the record as the Haydon memo).

According to the General Counsel and the Charging Party, this memo establishes that the motive for the Respondent's decision to consolidate the Taylor and Berea operations at Berea was to rid itself of the Union which represented Taylor employees.

In substance, the memo outlines Haydon's understanding of the background for the Respondent's determination to consolidate the Taylor lettershop operation in Berea. In the second paragraph, Haydon stated, ''On March 15, you surprised me with a very negative assessment of our future with the UAW and your obviously serious suggestion that we probably should look for another plant. You disabused me of the notion that we were trapped with the UAW.''

The memo's other references to the Union are: ''While I was entirely sympathetic with the idea of escaping the UAW . . . .'' ''Since closing Taylor was such a major change, we considered the pros and cons of closing Berea instead. Aside from the obvious negative of becoming even more vulnerable to the UAW, the costs of Taylor consolidation were unacceptable as you can see from the next page.'' ''In addition to the greater savings by closing Taylor, the consolidation in Berea: . . . removes us from the UAW and being *totally* at their mercy.''

However, the memo is five pages and deals mostly with savings associated with closing Taylor and consolidating the lettershops. The estimated savings set forth by Haydon was $1,351,400.

There are two other internal memos which the General Counsel and the Charging Party contend are newly discovered evidence: one dated March 31, 1983, from John K. Johnson to Haydon and one dated April 28, 1983, from Haydon to Polk. Neither mention the Union. Both deal with an analysis of savings should the Respondent close Taylor and consolidate at Berea and are similar to the Haydon memo.

A forth memo dated April 5 from Haydon to Polk, which the General Counsel admits having at the trial, sets forth preliminary estimates of savings and by which Haydon sought Polk's agreement in principle to consolidate. This memo was not offered into evidence by any party.

Prior to the trial in the underlying case, counsel for the General Counsel caused to be issued 10 subpoenas duces tecum directed to the Respondent to produce at the hearing all manner of documents. One set of subpoenas apparently sought to discover evidence with respect to the refusal-to-bargain allegation based on consolidating the operations and the other set had to do with the subcontracting allegation. Richard Allen, the Respondent's manager of labor relations, was one addressee to whom the subpoenas were directed and it is compliance with these subpoenas which is in issue. Identical subpoenas were addressed simply to the Respondent, however, compliance with them independent of the Allen subpoenas is not in issue.

The parties stipulated that the four memos discussed above were covered by the subpoenas. The General Counsel and Charging Party contend that three were not produced. They maintain that these documents were deliberately withheld from production by the Respondent's counsel. Therefore they meet the test of newly discovered evidence—they were in existence at the time of the trial, counsel for the General Counsel was excusably ignorant of their existence and exercised reasonable diligence to discover them. *Owen Lee Floor Service*, 250 NLRB 651 (1980).

The Respondent agrees that the memos were in existence at the time of the trial and were covered by one or more subpoena. The Respondent contends that they were made available to counsel for the General Counsel, or, at least, there is insufficient evidence they were not to justify reopening a record which has been closed more than 7 years.

B. *The Facts in Brief*

The Haydon memo is a document dated May 31, 1983, to be read by him at the meeting of the executive committee (he and several others) on that day or in early June. Haydon gave each participant at the meeting a copy. Allen claims to have had another dozen made and placed in various files in September 1984, but whether this in fact occurred is uncertain since Allen's testimony in all material aspects is suspect. In any event, at all material times, the Haydon memo was not a single document.

Allen is an attorney and was, in effect, the Respondent's in-house labor counsel. He was the liaison between trial counsel and the Respondent and was the one charged with collecting material set forth in the subpoena. It was also his activity in 1990 which resulted in this proceeding and he was the General Counsel's principal witness.

The General Counsel argues that Allen should be credited in most material respects and from his testimony it should be found that counsel for the Respondent in the underlying trial fraudulently concealed the three memos, a conclusion which is inferentially supported by the testimony of others that they never saw the memos and the memos were not found in the General Counsel's file. Thus, a resolution of Allen's credibility is necessary. I discredit his testimony, particularly where it is in conflict with other witnesses.

It is now 8 years since the events in issue and more than 9 since the Company's decision to consolidate. Thus, it should come as no surprise that memories are vague, critical participants are deceased, files have been purged, and in general, what actually happened cannot be determined with much certainty. However, there is no doubt in my mind that the events did not happen as Allen testified.

Dwight Vincent had represented the Respondent in labor relations matters for many years. He and a junior partner, Fred Batten, were counsel for the Respondent in the underlying case, but they do not now represent the Respondent.

Allen testified that he and Batten discovered the Haydon memo when searching John Johnson's file in preparation for the trial in September. Allen testified that on learning this, Wollenzin was upset and reprimanded him, stating that he used poor judgment in searching files with an attorney and that the memo should never have been in corporate files. Notwithstanding this remonstration by Wollenzin, Allen testified that he made a dozen copies of the memo and put them in various files. Such would have been gratuitous insubordination, which is so unlikely I conclude it did not happen.

The General Counsel contends that Allen's testimony about when the Haydon memo was discovered is supported by Batten's time record which shows that he and Allen reviewed Johnson's file. However, the time record of this event is for January when they were preparing for the trial then set to begin on January 30. Though Allen could simply have been mistaken, I believe he tailored his testimony to put Batten at the place and time when the memo was discovered. Similarly, I believe he tailored his testimony about what Wollenzin (who is now deceased) said in order to establish the Respondent's decision to conceal the Haydon memo.

No doubt sometime the Haydon memo came into Allen's possession. I do not believe, however, Batten was with him at the time or that Wollenzin made the comments Allen claims he did.

Allen testified that on three occasions he talked with Batten about the Haydon memo having not been produced because, ''my name was on the subpoena and I was concerned with the fact that the material hadn't been—been given to the NLRB and I remember talking to him about—the word that recall using—was why wasn't it introduced as an exhibit.''

The first time was on the last day of the trial. The second was shortly thereafter. Allen testified that Batten said the memo had not been offered into evidence because it was irrelevant, the 8(a)(3) allegation having been dismissed.

The third time was in May 1990, about 5-1/2 years later. Allen testified that he opened this meeting with Batten and Wollenzin by giving them copies of documents including a memo dated April 26, 1990, which he had just submitted to his supervisor, B. A. Bates (who is now deceased):

> As you know, I have been concerned for some time in regard to the failure of the Company to produce a subpoenaed memo pursuant to the Unfair Labor Practice Complaint filed by the UAW protesting the transfer of bargaining unit work from the Taylor Plant to the Berea Plant. We have previously discussed this matter and I have always maintained it was wrong and illegal to withhold the Haydon Memo which was subpoenaed by the National Labor Relations Board. It was wrong and fraudulent at the time of the trial, and it continues to be wrong and fraudulent. If I continue to ignore this illegal act of non-disclosure, then I shall become a party to it and this I do not intend to happen.
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> Since the decision of the N.L.R.B., I have been unsuccessful in convincing the Polk management that the situation must be corrected. The Company must submit the subpoenaed memo and if necessary settle the case by the reinstatement of all affected employees, including back pay and any other remedy ordered by the Board or State and Federal Courts.
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> I have decided to submit the requested memo and report all the circumstances to the N.L.R.B., any appropriate State agency and the Judiciary, both State and Federal, for a final disposition. I am well aware of the consequences of my reporting this illegality to the authorities, but since this matter has already been delayed for a very long period of time, I now believe this is the only course of action that remains.

But Allen did not in fact go to the NLRB, or the Union, as his memo to Bates stated he would. Instead, he drafted a settlement document, the essence of which was the Respondent would pay him a pension of about $10,000 per month.

The Company rejected Allen's proposal and suspended him on June 4, 1990, pending investigation of his charges. The Company retained Theodore Souris, a former Michigan Supreme Court justice, to investigate Allen's allegations. Allen was subsequently terminated, apparently effective June 4.

Allen retained counsel to represent him in an action under the Michigan ''Wistleblowers' Protection Act'' which was filed on August 28, 1990. Then by letter of September 27, Allen's attorney wrote the NLRB Regional Office enclosing a copy of the state court complaint and requesting a meeting. On October 18, a second letter from Allen's attorney was delivered to the Regional Office, enclosing a copy of the subpoena and the Haydon memo. About the same time, Allen gave the Union a copy of the Haydon memo.

Allen also gave Batten and Wollenzin an undated, handwritten memo dealing with his concern that employees laid off as a result of the move should be given increased pensions.

Batten credibly denied Allen asking him about the memo during or just after the trial, but he agreed with Allen's testimony about the meeting in May 1990.

In essence, Allen testified that after more than 5 years he undertook to correct a grievous wrong which had been bothering him all that time and was discharged by the Respondent for doing so. While this issue is for another tribunal to decide, the facts bear on Allen's credibility. I do not believe him.

John M. O'Hara is now the Respondent's chairman and chief executive officer. At the time of the underlying hearing, he was the general counsel, but in such capacity had minimal involvement in the proceeding. O'Hara credibily testified that Allen ''was not performing his job as a manager and I was looking for a replacement and talked to people in January of 1990 on interviewing a person to replace him.''

Although Allen claims to have had discussions about his concern with Wollenzin just after the trial and on other occasions, and with Bates as early as November 1988, the written

record he developed began in April 1990—after O'Hara began searching for a replacement.

The long lapses of time are simply not consistent with Allen's professed feelings of remorse. He waited 5-1/2 years after the trial before writing his first memo to Bates. In this he said he intended to rectify the problem by going to the NLRB. But he did not. Instead he offered the Respondent a settlement on very favorable terms to himself. This was rejected. He retained counsel and filed a lawsuit and only then did he approach the Board and the Union. His actions belie an intent to inform the Board. Rather, it appears, and I conclude, that Allen knew he was about to be replaced and undertook to make a record in support of an action against the Company. I simply do not believe his alleged discussions with the deceased Wollenzin and Bates.

Although his lawsuit is independent of this matter, because of it he had a substantial pecuniary interest framing his testimony here. This fact along with his demeanor leads me to conclude that his testimony is not worthy of belief. I believe the events involving the Haydon memo took place differently than Allen testified.

Vincent testified that he first saw the Haydon memo in June 1990. He did not recall seeing it during the trial or during his preparation and further, had he seen it ''I think I would have recalled it.'' However, he was not the one who searched the Respondent's files for documents in response to the subpoenas, nor did he go through the documents in the boxes of documents brought to the hearing room.

Vincent credibly testified: ''Here's my problem. I lost control of the documents with those because I normally try and do is get copies of them but there's beginning in such large number that I didn't have copies of them. He [Allen] just brought the box of documents. I didn't have copies of them and I didn't even have an opportunity to even look at them, so I have no idea what was in there.''

In addition, he testified that he does not recall seeing the April 28 and March 31 memos and believes he would have remembered them since they dealt with costs. Only a copy of the April 5 memo appeared in his file.

Batten also credibly testified that he first saw the Haydon memo sometime in May 1990 when he met with Allen and Wollenzin. He further testified that he reviewed his firm's file in the underlying case and found there only the April 5 memo. There were no copies of the March 31, April 28, or May 31 memos. Finally, Batten testified that he believes he would have remembered the Haydon memo had he seen it during the course of the trial or preparation for it. And, as with Vincent, he did not go through the documents in the boxes brought to the hearing room in response to the General Counsel's subpoenas.

Vincent and Batten testified that one of the boxes of documents brought to the hearing room was material gathered by Allen. This is corroborated by the testimony of Roman Zych in the underlying hearing. The Respondent produced 10 boxes of documents, 9 of which were brought by Zych and dealt with the subcontracting issue. He testified, ''Well, I think I brought nine. I think one then is Rich Allen's.''

Vincent and Batten also testified that on the opening day of the hearing Allen came with a folder of documents (which Allen denied, testifying he brought only a note pad); but neither knew what was in the folder.

O'Hara credibly testified that when Allen received the subpoenas he called stating he would like to talk—O'Hara being the Respondent's general counsel at the time. Allen came to O'Hara's office and they talked about the subpoena, and they discussed the Haydon memo. He testified, ''we talked about the memo and he said he was concerned because the union had friends out at Taylor and he thought they already had a copy; and I said to him, if they do, they do, it's your job to produce the documents and, you know, you're the one subpoenaed, if I can help you in production, I'll be glad to.''

Betsey Engel is an attorney employed by the International Union, UAW. During the underlying proceeding, she represented the Charging Party and assisted counsel for the General Counsel.

Engel testified that she first saw the Haydon memo in October 1990, a copy of which was given to her by an agent of the Union who in turn had received it from Allen. Engel stated that she did not see the memo during the underlying trial and had she, she would have remembered it because of the references to the Union. She characterized it as ''the veritable smoking gun.'' She also testified that she did not see the memos of March 31 and April 28 before or during the underlying trial.

James Stevens was counsel for the General Counsel. He also is now deceased. His co-counsel was Laura Goodman. In September 1984, Goodman had been an attorney in the General Counsel's Division of Advise for about 1=1/2 years. She was given a 10-day detail to Detroit for the purpose of assisting in the trial of the underlying case. She had not before participated in a trial, and her duties were, basically, to do what Stevens told her.

Goodman testified that she was present when Stevens and the Respondent's counsel discussed subpoenas and she went to the Taylor facility during the trial to look for documents.

She further testified that at the end of the third day of the hearing, Vincent handed over some additional documents saying that he had not been given them before. Stevens went through the documents as did Goodman.

Finally, she testified that she first saw the Haydon memo in late November or early December 1990 and was ''absolutely sure'' she did not see it during the trial because ''the words escaping the UAW in 1984 would have been a real red flag to me.''

I credit the testimony of Vincent, Batten, Engel, and Goodman that none of them saw any of the memos before or during the trial. I believe the testimony of each that he or she would have remembered the Haydon memo.

And I credit O'Hara. Although he is now the Respondent's chairman and has a clear interest in the outcome of this litigation, I found him believable and his demeanor positive. His testimony in all respects seems feasible.

On the other hand, I believe it was to Allen's perceived interest to construct his testimony such that there was concealment of the memos by agents of the Respondent, with himself simply a bystander who spoke out for their production. From all the credible evidence, I conclude this was not the case. Rather, the most probable sequence of events was:

The initial setting for the underlying case was January 30, 1984, in preparation for which, among other things, Batten and Allen examined company files, including John Johnson's. Batten's time record, but not his memory, confirm

this. But the Haydon and other memos were not discovered at this time. The trial was continued twice and finally set to begin September 24. Prior to this Allen was served with the subpoenas and was instructed to gather documents in response. Then he found the memos, and recognizing the negative import of the Haydon memo, he took it on himself not to tell outside counsel. He did, however, ask the Respondent's general counsel for advise and was told to comply with the subpoena.

Thus, I believe, Allen arrived at the hearing with the memos and was prepared to testify and produce them, as he had been instructed. However, he was not called as a witness, nor was he asked by anyone what he had brought in compliance with the subpoena. And the trial ended without Allen having disclosed the memos. This was where the matter lay until 5-1/2 years later, when Allen learned he was about to be terminated from his job. Remembering the memos, he undertook to make a record which would support a claim against the Respondent.

Allen sought to distinguish the Haydon memo from the other three, testifying that he found them in July or August under circumstances he cannot remember, whereas he found the Haydon memo with Batten in September. Assuming he had the four memos and showed them to counsel, it defies belief that they would not have produced the three which made no mention of the Union. They support the Respondent's theory in the underlying case and do not in any way reflect union animus. The most probable explanation is that Allen came across them after counsel had settled on the documents they intended to use and Allen did not bring them to counsel's attention. While these memos support the Respondent's case, the facts contained in them were available in other documents and were entered into evidence.

C. *Analysis*

The Board has repeatedly held that newly discovered evidence to support a motion to reopen under Section 102.48(d)(1) ''is evidence which was in existence at the time of the hearing, and of which the movant was excusably ignorant. A motion seeking to introduce evidence as newly discovered must also show facts from which it can be determined that the movant acted with reasonable diligence . . . .'' *Owen Lee Floor Service*, 260 NLRB 651 fn. 2 (1980). Further, ''the evidence must be so material as to require a different result.'' *Labor Services*, 265 NLRB 463 fn. 3 (1982). And finally, evidence which simply goes to impeachment of a witness is not sufficient to reopen a record. *NLRB v. Jacob E. Decker & Sons*, 569 F.2d 357 (5th Cir. 1978).

I conclude that the motion to reopen should be denied because: (1) the General Counsel did not exercise reasonable diligence in discovering the Haydon and other two memos and (2) none of the three memos, singly or together, is sufficient to require a different result from that reached by Judge Donnelly.

1. Reasonable diligence

In its Order, the Board stated, ''The threshold issue at such hearing is whether Respondent failed to comply with the subpoena duces tecum. (Footnote: A related issue is whether the evidence concerning any such noncompliance is newly discovered or was fraudulently concealed.)'' The evidence is inconclusive on this point. However, I do conclude there is a presumption of regularity. Absent definitive evidence to the contrary, I conclude that compliance with the subpoena must be presumed.

A subpoena duces tecum is a writ which requires the person to whom it is addressed to appear in court at a particular time and bring the designated documents. In order to establish noncompliance, at a minimum, the counsel who requested the subpoena be issued must ask the party subpoenaed for the documents. That was not done here. The credible testimony is that Allen in fact came to the hearing on the day designated in the subpoena and had with him some material. It is unknown whether he had the Haydon or other two memos. But counsel for the General Counsel did not call him as a witness or even ask whether he had brought any subpoenaed documents.

Therefore, I conclude there is an insufficient predicate to find that the Respondent failed to comply with the subpoena duces tecum. Research has disclosed no case (Board or court) wherein noncompliance with a subpoena was found absent the subpoenaed individual being called as a witness. Unless and until the individual subpoenaed has been put on the witness stand and there states that he will not testify or submit the documents, there is no basis to conclude he has not complied.

Counsel for the General Counsel failed to follow up on the subpoena and make some effort to determine what Allen had brought to the hearing. The fact that counsel requested a subpoena be issued does not itself establish that he exercised due diligence.

I believe that Allen did all he was required to do in compliance with the subpoena. He was present at the time stated and had, at least, the three memos. Stevens did not complete the process and call Allen as a witness as he had Zych, another representative of the Respondent who was charged with bringing subpoenaed documents.

In addition, even if Allen did not comply with the subpoena, I conclude that counsel for the General Counsel did not exercise due diligence. Indisputably, he had the April 5 memo from Haydon to Polk which set forth an analysis of the cost consequences of consolidating the Taylor lettershop operation at Berea. He could easily have called Haydon and asked if he wrote any additional memos on this subject. He could have asked Harvey Hays, who was a witness, about the April 5 memo and any others; but he did not. Stevens did ask Hays about the June meeting (at which Haydon read his May 31 memo) and whether there were documents passed out at the meeting and ''whether any of the other participants at the meeting had any other documents with them?'' Hays responded, ''I don't recall. I assume they did; I really don't know.'' Had this line been pursued with other witnesses, in all probability Stevens would have discovered the May 31 memo, if in fact he did not know about it at the time.

During the examination of Hays, Stevens made assertions that counsel for the Respondent had not produced everything that had been under subpoena, and that he had just received additional documents. Stevens asked for, and received, an overnight recess.

Whether the May 31 memo and the two others were presented at this time is unknown. It is known that Stevens did not call either Allen or Haydon, choosing, apparently, to rely

on counsel for the Respondent, even though, according to Engel and Goodman, Stevens and they did not believe the Respondent's counsel was forthcoming in the production of documents. I conclude that one cannot be found diligent in claiming reliance on representations he does not believe.

In any event, an attorney can only represent what he has been told by his client, and for subpoena compliance purposes, what he has been given. An attorney is not the custodian of his client's files. Thus, if Stevens was concerned about the completeness of production pursuant to the subpoena, the subpoenaed witness should have been called and interrogated. Simply relying on the representations of counsel cannot be deemed due diligence if there is any question concerning compliance.

Of course, when counsel makes representations, such are binding on his client. E.g., *Sonicraft, Inc*., 295 NLRB 766 (1989), where counsel erroneously told a Board field examiner that a tape was unintelligible and refused to produce it. Here, had counsel for the Respondent been asked if Allen had brought any internal memos, their negative reply would, I believe, be sufficient to establish noncompliance. But there is no evidence they were asked anything along this line. At the outset of the hearing Vincent announced that Allen was there in response to the subpoena. Vincent was never asked what Allen brought.

Vincent did testify that on the third day of the hearing, when Stevens asked if the documents he had been given was all they had, Vincent in turn asked Allen, who replied in the affirmative. Such would be some evidence that Allen (and therefore the Respondent) concealed the memos. Allen denied he was in the hearing room at the time, having been sequestered for the testimony of Harvey Hayes. This assertion tends to be supported by the record in the underlying case. Batten testified that Allen was present. Engel did not remember. Goodman testified, ''I don't remember him being present.'' The record is just too ambiguous to find that Allen was present at this time and made a statement to the effect that the Respondent had given counsel for the General Counsel all the material under subpoena. Further, even if this happened as Vincent testified, it would not have relieved the General Counsel from calling Allen, or others. And, as noted above, counsel for the General Counsel and Charging Party did not believe Vincent's representation; therefore, they cannot claim reliance on it.

It should here be noted that the Board's Rules and Regulations do not provide for pretrial discovery. Though counsel are typically cooperative, as were Vincent and Batten in meeting with Stevens the week before the trial, under the Rules the General Counsel has no right to expect that a respondent's counsel will produce documents, whether or not they have been subpoenaed. In order to get documents, a subpoena must be issued and the witness interrogated. I do not believe simply issuing a subpoena and asking counsel about it in general terms amounts to due diligence.

Such would be close to asking counsel if he had any documents which would support the General Counsel's case. I do not believe that a negative reply by Respondent's counsel would prove due diligence on the part of counsel for the General Counsel.

If, as in *Sonicraft*, a company's attorney makes a statement of fact to an examiner—that the tape of a meeting is undecipherable—then such can be relied on. But general questions cannot. If the General Counsel issues a subpoena for documents, in order to establish that there was no compliance, a record must be made. At a minimum, the witness must be asked what he brought in compliance with the subpoena. That was not done here, even through counsel.

Beyond this is the doubt that the Haydon memo was not made available to Stevens. The Respondent brought a box of documents (in addition to the nine boxes of material dealing with subcontracting) to the hearing room and offered them for inspection. Neither Vincent nor Batten knew what was in the box. Again, Allen, who was responsible for the documents, was not called as a witness.

It was principally Stevens who examined the documents. He could well have seen the Haydon and other memos and concluded they were simply more evidence supporting the Respondent's position and determined to ignore them. As noted, he had the April 5 memo and did not use it. Even though the Haydon memo makes adverse comments about the Union, its tenor is as supportive of the Respondent's case as the General Counsel's. If Stevens had offered it into evidence, the Respondent would likely have called Haydon to explain it and such would have added to the Respondent's proof.

To summarize: I discredit Allen and conclude he came to the hearing with a file folder of documents, including the three memos in question, as he had been instructed by O'Hara. Vincent and Batten were not aware of the memos and did not know what Allen had. Stevens did not call Allen as a witness or ask what he had brought in response to the subpoena. Thus, I conclude that if Stevens did not in fact see the three memos, he did not exercise due diligence discovering them.

The evidence is simply insufficient to conclude that the General Counsel was excusably ignorant of the Haydon and other two memos. The strong policy that there must be an end to litigation cannot be overcome by such insubstantial evidence.

2. Impact of the memos

Assuming that the General Counsel was excusably ignorant of the three memos, and did exercise due diligence, the motion to reopen should not be granted because this evidence would not require a different result than that reached by Judge Donnelly on the issues he heard. Accepting Judge Donnelly's credibility findings and general analysis, I conclude that the addition of these memos would have added to the Respondent's argument that its decision to consolidate turned on cost factors well beyond labor costs.

At best the Haydon memo contains language which could be construed as an understanding on Haydon's part that it was desirable to get rid of the Union as the employees' bargaining representative. Such a motive would tend to negate the Respondent's contention that other factors dominated. However, there was other evidence before Judge Donnelly on this issue, namely undenied statements attributed to John Johnson, Dan Harvey, and Allen to the effect that Respondent sought to rid itself of labor costs incurred under the UAW contract. Judge Donnelly credited this evidence, but nevertheless concluded, ''A careful and balanced review of the evidence convinces me that the decision, which was not made by Johnson, Harvey, or Allen, but by Wollenzin, was

based on business considerations and while labor costs were considered, the decision did not 'turn on' that item.''

For purposes of determining whether certain evidence would justify reopening a closed record, I must accept Judge Donnelly's findings and analysis and add to that the new evidence. If then a different result is required (not just possible) the motion to reopen should be granted. It would be inappropriate for me to attempt to decide the case de novo and would be contrary to the Board's orders, including the Order of June 25, 1991.

Since the Haydon memo cuts both ways—some parts in favor of the General Counsel's theory, some in favor of the Respondent's—I conclude its receipt into evidence would not require a different result than that reached by Judge Donnelly on the 8(a)(5) allegation. Similarly, the other two memos are strong support for the Respondent's theory.

It should be noted here that Judge Donnelly relied on *Otis Elevator Co*., 269 NLRB 891 (1984), in accessing the impact of labor costs. Although the Board changed its analytical approach in *Dubuque Packing Co*., 303 NLRB 386 (1991), for purposes of determining the impact of the evidence on the underlying case, the law at the time would seem applicable. In *Dubuque*, the Board stated that ''we have endeavored to develop a test that provides guidance and predictability to the parties.'' Id. at 390. Such suggests prospective application of the principles therein, at least in cases other than *Dubuque* itself. To say that the *Dubuque* analysis applies here and that the Haydon memo would require a different result would necessarily mean relitigation of the underlying case. Such a result would certainly be contrary to a policy of finality of litigation.

Further, the antiunion comments in the Haydon memo really would have done little to support the General Counsel's case. There was no 8(a)(3) issue to be litigated, thus evidence of animus was irrelevant. The underlying case was tried solely on 8(a)(5) theories. Perhaps with the Haydon memo, the General Counsel would have moved to amend the complaint to add an 8(a)(3) allegation and perhaps it would have been allowed; but not necessarily.

As noted above, the Union had charged that the Respondent's activity violated Section 8(a)(3), but this was ultimately dismissed (on March 15, 1984) and the case was tried only on 8(a)(5) theories. Here, the General Counsel and Charging Party contend that if the Haydon memo had been produced, then the complaint would have been amended and an 8(a)(3) violation found.

But the Haydon memo does not per se establish an 8(a)(3) violation, and it does contain information adverse to the General Counsel's theory. And such an amendment to the complaint would no doubt have resulted in a continuance of the hearing, which was first set in January 1984 and had already been continued twice.

Though the law on amending a complaint to include a dismissed allegation after running of the 10(b) period was in a state of flux, it is possible that the 8(a)(3) allegation sought here is closely related to the 8(a)(5) allegation litigated. Thus, a ruling to allow an amendment might have been sustained, notwithstanding the Board's decision in *Ducane Heating Corp*., 273 NLRB 1389 (1985), filed just before Judge Donnelly's decision was transferred to the Board. Though decided some 3-1/2 years later, *Redd-I, Inc*., 290 NLRB 1115 (1988), would seem to support such an amendment, had it been made at the time of the trial.

It is, however, by no means certain that in early 1985, the Board would have sustained a decision to allow an 8(a)(3) amendment to the complaint. Similarly, it is speculation to conclude that Stevens did not see the Haydon memo and that had he, he would have moved to amend the complaint. Indeed some evidence of an antiunion motive was in the record and uncontested, but Judge Donnelly discounted it was the motivating cause of the consolidation. I conclude that to revive a case which has been closed more than 7 years must be based on more than legal and factual surmise.

Had the Haydon memo been received by Judge Donnelly and the complaint amended to add an 8(a)(3) allegation, it is unlikely the result would have been different. There was no evidence of general antiunion motive by the Respondent, as the General Counsel concluded in affirming the Regional Director's dismissal of the 8(a)(3) charge. There was evidence of the Respondent's intent to avoid the costs of the collective-bargaining agreement with the Union.

Thus, even with the Haydon memo, the total record would not support finding an 8(a)(3) violation. The antiunion comments by Haydon refer to labor costs in the contract. That the Company wanted to get out from under these costs was considered by Judge Donnelly. The Company did not intend to rid itself of a union representing its employees, since the Berea employees were also represented by a labor organization. The consolidation here was consistent with the Company's past practice of closing lettershop operations. During Haydon's tenure, the number of lettershops had been reduced from 9 or 10 to the 2 at Taylor and Berea. From the testimony of Haydon and O'Hara, along with Judge Donnelly's findings, even if the memo established a prima facie case, I believe it was rebutted.

Finally, the General Counsel argues that the Haydon memo tends to undermine the credibility of Wollenzin. Such is an insufficient basis to reopen a record, even with newly discovered evidence. *Field Bridge Associates*, 306 NLRB 322 (1992). The fact that the memo might have affected Wollenzin's credibility, which is far from certain, does not mean that Wollenzin would have been discredited by Judge Donnelly.

The Charging Party contends that the Haydon memo proves that Wollenzin committed perjury—that his testimony conflicted with statements by Haydon in material respects. Thus, the record should be reopened, citing *Inland Container Corp*., 273 NLRB 1856 (1985). Unlike *Inland*, the memo is not a statement by Wollenzin in direct conflict with his testimony. It is a statement by someone else from which a different conclusion could be reached concerning material facts than those testified to Wollenzin. As such, *Inland Container* is inapposite.

If counsel for the General Counsel had had the Haydon memo and used it to cross-examine Wollenzin, perhaps he would have developed inconsistencies which would have affected Judge Donnelly's credibility resolution. Perhaps not. Haydon's statements in the memo are not so contrary to Wollenzin's testimony to require the conclusion that Wollenzin committed perjury, or even that his version of the events was not accurate.

Along with the Charging Party's motion to reopen, the General Counsel has moved to amend the complaint now to

include an 8(a)(3) allegation. For all the foregoing reasons, that motion should be denied. In addition, I note that only if Judge Donnelly's dismissal of the complaint is reversed, would there be a live charge to support the proposed amendment. If, as I conclude, the Haydon memo would not require a different result than that reached by Judge Donnelly, then there is no complaint to amend. Thus, the proposed amendment is in the nature of a new allegation filed more than 6 months after the events alleged. Accordingly, it would be barred by Section 10(b). Even *Redd-I* requires a live charge before an amendment would be allowed.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Charging Party's motion to reopen record and the General Counsel's motion to amend the amended complaint are denied.

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[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.